COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040125-02**

Catherine Doherty	Employee
Shaw's Supermarkets	Employer
Shaw's Supermarkets	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Carroll)

APPEARANCES
Peter Georgiou, Esq., for the employee
Edward M. Moriarty, Esq., for the self-insurer

COSTIGAN, J. The employee appeals from a decision in which an administrative judge awarded her closed periods of §§ 34 and 35 incapacity benefits for an accepted industrial injury. The employee contends that the impartial physician, appointed by the department pursuant to § 11A to examine her, was biased against workers in general, and against her specifically. She also argues that the doctor refused to answer a hypothetical question posed to him at his deposition and, therefore, his opinions should have been excluded from evidence. For the reasons that follow, we affirm the decision.

The employee suffered from fibromyalgia prior to commencing employment with Shaw's Supermarkets in October 1999. On June 29, 2002, she sustained a work injury "when she felt sharp pain in her back after unloading and shifting two pallets of produce weighing up to 70 pounds." (Dec. 7.) The employee treated with physical therapy and chiropractic, but her back pain continued. She also complained of pain in her neck, right shoulder and right hip.[1]

[1] The employee testified that in February 2002, she tripped and fell at work, injuring her right hip, shoulder and forearm. Noting the absence of contemporaneous medical records documenting such an accident, the administrative judge found that,

> [a]ny medical diagnosis or treatment to the Employee's right side, right hip and right shoulder and forearm are not causally related to an industrial injury.

(Dec. 5-7.)

Initially the self-insurer paid weekly incapacity benefits[2] without prejudice. G. L. c. 152, §§ 7 and 8. The employee filed a claim for continuing total incapacity benefits, which the self-insurer resisted. At the § 10A conference, the self-insurer accepted liability for the June 29, 2002 low back injury, but raised the issues of causal relationship, extent of disability, and the § 1(7A) heightened standard of causation,[3] in defense of the employee's claim. (Dec. 2-3.) The judge

---

> Further, I find the Employee did not continue with low back and right hip pain as a result of any work event on this date . . . I do not credit the Employee's testimony that she incurred injury to other than her low back [on June 29, 2002].

(Dec. 6-7.)

[2] The self-insurer paid § 34 total incapacity benefits from July 7, 2002 through November 29, 2002, and maximum § 35 partial incapacity benefits thereafter, until the judge's conference order was filed. (Dec. 2.)

[3] By raising that defense, the self-insurer assumed "the burden of producing evidence of the predicates to § 1(7A)'s application – the existence of a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, that combines with the compensable injury or disease that is the subject of the claim. . . ." Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000). The administrative judge made no explicit finding that the self-insurer carried its burden, but certain of his findings touch on the issue: "Any medical diagnosis or treatment to the Employee's right side, right hip and right shoulder and forearm are [sic] not causally related to an industrial injury." (Dec. 6); "I do not credit the Employee's testimony that she incurred injury [at work] to other than her low back." (Dec. 7); and "[t]he Employee's back complaints were the only symptoms causally related to the industrial injury." (Dec. 11.) The judge adopted the § 11A physician's opinions to find that "[f]ibromyalgia is a painful condition accompanied by pain all over the body, and the Employee was on medication for this condition. . . . The Employee has arthritis in multiple joints and it is worse now because of time. . . . [T]he physical activities of the Employee's work had no impact on her underlying condition. . . . The employee's type of work would have *no impact* on her condition of degenerative spondylosis in terms of aggravating, worsening or probably accelerating her symptoms." (Dec. 9; emphasis added, citations omitted.) The judge also found that "[a] few months following this [work] injury the Employee's right shoulder became painful and at hearing the pain was constant. The Employee experiences constant pain in her neck. I find these symptoms are not causally related to the industrial injury." (Dec. 7.) We see nothing in these subsidiary findings, or in the adopted medical opinions, that proves the "combination" required under § 1(7A). In any event, the judge's award of weekly incapacity benefits up to the June 12, 2003 impartial medical

awarded § 34 total incapacity benefits from November 30, 2002 and continuing, and the self-insurer appealed.

On June 12, 2003, the employee underwent a § 11A impartial medical examination by Dr. Edgar W. Robertson. The impartial physician noted the employee's pre-existing fibromyalgia, for which she was treating with medication (Mobic) when she started working for Shaw's. The doctor also noted that the employee had degenerative cervical and lumbar spondylosis, which included disc protrusions at different levels with no evidence of nerve root compression. The impartial physician opined that the disc protrusions and degenerative changes predated the employee's employment with the employer. He disabled the employee from returning to her job as a seafood manager, but felt that she could do work involving less lifting, bending, stooping and physical activity. The impartial physician opined that when he examined the employee, her disability was no longer causally related to her work injury of June 29, 2002. (Dec. 8.)

At the hearing on May 5, 2004, the judge found the impartial medical report adequate but for the so-called "gap" period between the date of injury and the June 12, 2003 § 11A examination, for which the parties were allowed to submit additional medical evidence. After the employee deposed the § 11A physician, she moved to have the impartial report declared inadequate based on alleged bias of the doctor and medical complexity. The judge denied the motion as to bias but allowed it as to medical complexity. Thus, the parties were permitted to submit additional medical evidence on all issues. (Dec. 3-4.)

When deposed by the employee on June 18, 2004, the impartial physician elaborated on the opinions given in his report. He maintained that the employee's work injury had no impact on her underlying conditions of fibromyalgia and degenerative spondylosis. He opined the employee's continuing symptoms of

---

exam, from which the self-insurer did not appeal, and the impartial physician's opinion of *no* causal relationship between the work injury and the employee's continuing partial disability thereafter, render the § 1(7A) issue moot.

pain were not attributable to her work injury. The doctor also noted the employee had progressive arthritis in multiple joints, but no neurological problem. (Dec. 9.)

The judge adopted in part the impartial physician's opinions. He also adopted in part the opinions of the self-insurer's medical expert, Dr. Richard Hawkins. Dr. Hawkins first examined the employee on September 12, 2002. He diagnosed a lumbar strain causally related to the employee's work injury of June 29, 2002, and opined the employee could then return to modified work with limited bending and lifting of no more than twenty pounds. The doctor's opinions remained the same when he re-examined the employee on March 27, 2003, although he also opined the employee likely could resume unrestricted work in four weeks. (Dec. 11-12.)

The judge awarded the employee § 34 benefits through March 26, 2003, and then § 35 benefits, based on a $320 assigned earning capacity, until June 12, 2003, the date of the impartial examination. The judge terminated benefits as of that date, based on the § 11A physician's opinion of no continuing causal relationship between the employee's work injury and her ongoing partial disability. (Dec. 14-16.)

On appeal, the employee points to certain of the § 11A physician's answers on cross-examination as evidence of bias. In assessing whether the judge's finding of no bias is error, we set forth the doctor's testimony in some detail.

The impartial physician testified that the opinions in his report were based on "when I saw her. I didn't see her on the next day [after the work incident]." (Dep. 30.) Contrary to the employee's contention on appeal, the doctor did address employee's counsel's hypothetical question:

> Q.: If you have a pre-existing condition such as Ms. Doherty has in this situation, a degenerative process, that as you say may have been going on for years, now . . . if we assume that she was doing her regular duties day in and day out, 8 hours a day, 40 hours a week from the date she got hired at Shaw's until June 12 [sic], 2002 when

she reports that she was doing a lot of heavy lifting that day and her back, according to her, without her knowing her medical condition as well as you probably are [sic] from a technical perspective, then she reports that my back now hurts me to the degree that I cannot longer function at that job, my question to you, if we accept these sets of facts as true, would the activities that she performed at work that particular day, could they be the cause of the symptoms to the degree that she experiences them subsequent to the event?

. . .

A.: I have answered the question. I answered it no.
Q.: And the – And your reasoning behind your answer is what?
A.: Well, I tried to explain it. It's because I don't see any physical mechanism where these allegations that you have lined up make sense logically in a medical way.

. . .

You have a degenerative condition which gets worse with age. You have a condition called fibromyalgia which we don't understand but doesn't have much treatment. That doesn't go away spontaneously. You have these underlining [sic] things. You have somebody that maybe did a bit too much one day. She aggravated her preexisting condition and maybe she's going to be sore for a couple of days or a week.[4] Is that person incapable of ever doing work? We don't know because this person never tried to do it. Is that person disabled the rest of her life? Probably not, but we don't know. This person has never been tested. I can see straining something, giving it a few weeks to heal, and then going back. Now, my analogy is an athletic injury. You're an athlete. I can tell. And you have had injuries, and if you wait, they heal up. Do you never go back to that sport? No. If you say I can't go back to that sport, why not? I can't. If someone was -- If you had another reason not to go back to the sport that's another thing. That's called secondary gain which is always in these cases and it is huge.

(Dep. 34-36.) The employee pressed on:

[4] This statement is as close as the § 11A physician gets to the § 1(7A) predicate of combination. It is not close enough.

Q.: [A]s of the day you examined her, approximately a year ago, June 2003, it was your opinion that she could not go back and do her job at Shaw's, correct?
A.: Right.
Q.: Now, why couldn't she go back as of that day? What was the reason why she couldn't go back?
A.: Can I quote from the report?
Q.: Sure.
A.: I state my line of reasoning. Her line of work requires considerable strength which this lady does possess; however, it requires considerable flexibility and ability to do her repetitive motions. Because of this patient's degenerative condition in her lumbar and cervical spine this is probably not the best line of work for her.

. . .

Q.: What would be your explanation with regards as to why this woman could perform her work with all these activities that you now agree that she shouldn't undertake prior to the date of this industrial injury as opposed to the day after? . . .
A.: Her arthritis is much worse. It's two years later.

. . .

I think this lady's joints are wearing out all over her body.
Q.: You are saying this wear and tear type of processes that's going on, it all came to the forefront in the one year between the date of the injury and the date of your examination?
A.: That's not what I said.
Q.: What are you saying?
A.: I believe it is an ongoing process getting worse every year. At some point she decided she couldn't work any more.
Q.: So you think this is a conscious decision on her part?
A.: Yes.
Q.: . . . [T]his doesn't have to do with any medical explanation as to what happened to her between June 2002 and June 2003 when you saw her? It has to do with your opinion she is making a conscious decision not to return to that type of work?
A.: I believe, and somebody told her not to. I forgot. One of the doctors said she was disabled, told her not to go back.
Q.: You think this is the reason why she is not back?
A.: I think she feels she can't do it. There is nothing in these medical records that shows me any injury that can be attributed to this work.

. . .

Q.: So, in other words, the type of work that she did for Shaw's for say two or three years, it is your opinion that the physical activities at work had no impact at all in the underlining [sic] conditions?
A.: Correct.

. . .

Q.: [G]iven your diagnosis of degenerative spondylosis, the type of work she was doing at Shaw's, would that have any impact on that condition?
A.: No.
Q.: In terms of worsening?
A.: No.
Q.: Aggravating it?
A.: No.
Q.: Accelerating any symptom manifestation?
A.: Probably not.

(Dep. 39-44.)

The doctor's testimony, pared to its essence, is simply a competent medical opinion that the work injury was not a contributing factor to the employee's partial disability when he examined her. The judge did not err in adopting that opinion.

We turn to the employee's allegations of bias. She alleges that the impartial physician was biased against working people in general. The exchange between counsel and the doctor, upon which this allegation is based, falls short of establishing, as a matter of law, that the doctor was biased. (Dep. 56-58.) We note that his most troubling answer, comparing professionals who like their occupations with working people who do not like their jobs,[5] was not in evidence,

[5] Responding to employee's counsel, Dr. Robertson testified:

> Athletes are like lawyers and physicians. They much prefer to continue their occupations. People who do jobs they don't really enjoy that you and I wouldn't really want to do for those kind of wages, are the first to give them up at any opportunity, whereas you and I would continue our jobs because we enjoy them, even if we are in a wheelchair like Perry Mason.

as the self-insurer's objection to the preceding question was sustained. (Dec. 4.) However, even if it were in evidence, the testimony could be read to fall within the category of general statements that we have concluded do not rise to the level of bias. See Cramer v. Wal-Mart, 12 Mass. Workers' Comp. Rep. 316 (1998)(impartial physician's general statements concerning secondary gain did not indicate bias).

Regarding the employee's allegation of specific bias against her, again we do not see that the administrative judge had to find bias, as a matter of law. He stated: "I do not find that [the § 11A physician] expressed bias towards the Employee . . . nor do I find that allegations made by the employee merit a finding that [the doctor's] report is inadequate as a matter of law." (Dec. 4.) We cannot say that this determination was arbitrary or capricious. See § 11C. The doctor testified that the employee's identification of her physical activities at work on June 29, 2002 as the genesis of all of her symptoms simply did not make sense to him. (Dep. 34-36.) This is a competent medical opinion, and we see no bias reflected in it. Cf. Moynihan v. Wee Folks Nursery, Inc. 17 Mass. Workers' Comp. Rep. 342, 346 (2003)(doctor discredited employee's account of injury, stating explicitly "that [his judgment had] nothing to do with a medical judgment as to what she had"). Indeed, unlike the impartial physician in Moynihan, the doctor here countered employee's counsel's suggestion that he was offering an opinion that was not a "medical explanation." "There is nothing in these medical records that shows me any injury that can be attributed to this work." (Dep. 42.)

(Dep. 58.) Notwithstanding the doctor's confusion as to characters portrayed by actor Raymond Burr on television (ambulatory criminal defense attorney Perry Mason in "Perry Mason" on CBS, 1957-1966, and in made-for-TV movies, 1985-1993, vs. wheelchair-bound chief of detectives Robert Ironside in "Ironside" on NBC, 1967-1975), and his ill-advised sociological musings about individuals' motivations to work, the doctor's ultimate opinions as to disability and causal relationship are unequivocal, and based on medical considerations only.

As to the judge's determinations of incapacity, his finding of total incapacity from the date of injury to March 27, 2003, whether supported by the evidence or not, stands, as the self-insurer has not appealed the decision. The judge's finding that the employee's incapacity was only partial as of March 27, 2003, is amply supported by Dr. Hawkins's adopted opinion. Dr. Hawkins re-examined the employee on that date and opined that she could then perform modified work with restrictions against repetitive bending and lifting in excess of twenty pounds. He further opined that she could likely resume unrestricted work four weeks from that date. (Dec. 12, 14; Ex. 9.) However, the judge deemed that a speculative opinion, and found causally related partial incapacity for another eleven weeks, until the June 12, 2003 impartial medical examination. (Dec. 12-13.) Again, in the absence of an appeal by the self-insurer, that award of § 35 benefits stands. Lastly, as discussed infra, the denial of the employee's claim for benefits after June 12, 2003 is warranted by the adopted impartial medical opinion of no continuing causal relationship to the work injury.

Accordingly, we affirm the decision.

So ordered.

_____
Patricia A. Costigan
Administrative Law Judge

_____
William A. McCarthy
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

Filed: **November 30, 2005**